BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY G. ANDERSON	)	
Claimant	)	
	)	
VS.	)	
	)	
KANZA CONSTRUCTION COMPANY, INC.	)	
Respondent	)	Docket No. 5,033,850
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the Order and approved settlement on August 5, 2010 by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on November 9, 2010. E. Lee Kinch, of Wichita, Kansas, was assigned as a pro tem Board Member.[1]

APPEARANCES

Geoffrey Clark, of Pittsburg, Kansas, appeared for the claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The transcript and accompanying attachments from the August 5, 2010 settlement hearing along with the contents of the Division's file comprise the record.

[1] This assignment was made in light of the retirement of Board Member, Carol Foreman.

ISSUES

The SALJ approved a settlement agreement between claimant, who appeared pro se[2], and respondent for a 5 percent permanent partial impairment to the body as a whole.

Claimant, who has since hired counsel and filed his Application for Review within 10 days of the settlement, argues that there is nothing in the record to indicate that he understood the full extent of his legal rights in this matter. Claimant also contends the SALJ did not comply with K.S.A. 44-531 or K.A.R. 51-3-9 and failed to find that the settlement was in claimant's best interest. Thus, claimant asks the Board to set aside the settlement and allow claimant to proceed with his claim.

Respondent argues that claimant was sufficiently informed of the legal consequences of his decision to settle this matter as evidenced by the contents of the settlement transcript and therefore, the Board should deny claimant's request and leave the parties' settlement intact. In the alternative, respondent suggests that the matter should be remanded to an ALJ for the purpose of holding an evidentiary hearing to determine whether and if the requisite elements were present at the time of the settlement hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant appealed the August 5, 2010 Settlement Award that was entered in his undocketed claim arising out of an accident occurring on September 1, 2009, in Monroe, Louisiana. In short, claimant argues that SALJ Shelor erred by failing to elicit sufficient information to find that the settlement was in his best interest or that by settling the case, the parties would avoid undue litigation expense or hardship. Claimant also contends that there is no evidence that he had read the medical report, had it read to him or that he fully understood the contents of that report as it related to disability, his entitlement to a work disability or his entitlement to future medical benefits[3]. Accordingly, claimant requests that the Board set aside the Settlement Award and allow him to proceed with his claim.

Respondent maintains the entirety of the settlement transcript, coupled with the supporting medical record, shows the settlement was, in fact, in claimant's best interest

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[2] Claimant did not appear in person but rather appeared by phone. Respondent's counsel and the SALJ were together in an office in Topeka, Kansas.

[3] Claimant's Brief at 2 (filed Sept. 17, 2010).

and was intended to avoid any further expense or hardship to either party. Thus, respondent urges the Board to affirm the Settlement Agreement. Alternatively, respondent requests that the Board remand this matter to an Administrative Law Judge "for the purpose of compiling an evidentiary record on this sole issue" as was done in *Grajeda*.[4]

The respondent presented SALJ Shelor with a document entitled Worksheet for Settlements, which set forth the terms of the parties' settlement agreement. This document incorporated a portion of a medical report authored by Dr. Alexander Bailey, dated July 16, 2010. That report indicates that claimant has been released to a "regular physical demand level" and requires no long-term restrictions. Nonetheless, according to Dr. Bailey claimant had a 10 percent permanent impairment but because of his congenital and pre-existing spinal stenosis, Dr. Bailey only related 2.5 percent permanent partial disability to the body as a whole as a result of his work related injury.[5] The record is silent as to whether claimant had read this report or it had been read to him.

The settlement document goes on to reflect the terms of settlement as follows:

> **$11,329.50**, on a strict compromise of the following issues:
>
> Any and all issues in all claim [sic]; said amount is based on a 5% permanent partial impairment to the body as a whole.
>
> The above compromise agreement closes out any and all issues, in any and all workers' compensation claims, in any and all jurisdictions claimant may have against Kanza Construction Company, Inc. And American Zurich Insurance Company up to and including August 5, 2010.[6]

At the settlement hearing, claimant represented himself, waiving any right to get an attorney.[7] He was informed about the possibility of dual jurisdiction since his work-related injury arose out of an accident in Monroe, Louisiana. Claimant was further informed about the right to appeal and the right to receive written notice of the hearing, both of which he expressly waived. He was then asked the following:

> **JUDGE SHELOR**: You understand the extent of this injury and how it relates to the settlement you want me to approve, is that correct?

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[4] Respondent's Brief at 2 (filed Oct. 11, 2010); citing *Grajeda v. Aramark Corp.*, 35 Kan. App.2d 132 P.3d 966 (2006).

[5] S.H. Trans., Attachment (Dr. Alexander Bailey's July 16, 2010 report page 2).

[6] Claimant's Brief at 2 (filed Sept. 17, 2010), (Form 12, attached to claimant's brief).

[7] S.H. Trans. at 4.

THE CLAIMANT: Yes, sir, I do.[8]

At that point respondent's counsel went ahead and read into the record the terms of the settlement.[9]

After hearing the terms of the settlement, claimant was asked whether he wished the SALJ to approve the proposed settlement, to which he responded "Yes, sir, I do."[10] At that point, the SALJ said the following:

> Based on your testimony and statements of counsel, I find this settlement to be in your best interest as outlined on the worksheet for settlement that will be incorporated into the record. Cost of the hearing is assessed to the respondent.[11]

Thereafter, a check was tendered on the record and respondent's counsel indicated that he would be mailing that check directly to the claimant.

On August 18, 2010, the Division of Workers Compensation received claimant's application for review of the August 5, 2010 Settlement Award entered by the SALJ.

The Kansas Court of Appeals has concluded that the Board has jurisdiction to consider such applications.[12] Thus, we need only concern ourselves with whether claimant's settlement hearing complied with the requirements of KS.A. 44-531 and K.A.R. 51-3-9.

Both the Kansas legislature and the Division of Workers Compensation (by way of administrative regulations) have enacted provisions to protect injured workers regarding lump sum settlement awards. K.S.A. 44-531(a) provides:

> Where all parties agree to the payment of all or any part of compensation due under the workers compensation act or under any award or judgment, and where it has been determined at a hearing before the administrative law judge that it is for the best interest of the injured employee or the dependents of a deceased employee, or that it will avoid undue expense, litigation or hardship to any party or parties, the administrative law judge may permit the employer to redeem all or any part of the employer's liability under the workers compensation act by the payment of

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[8] *Id.* at 5.

[9] Respondent agreed to pay a total of 5 percent to the whole body, a sum totaling $11,329.50.

[10] S.H. Trans. at 5.

[11] *Id.* at 6.

[12] *Grajeda v. Aramark Corp.*, 35 Kan. App.2d 598, 132 P.3d 966 (2006).

> compensation in a lump sum, **except that no agreement for payment of compensation in a lump sum shall be approved for nine months after an employee has returned to work in cases in which the employee, who would otherwise be entitled to compensation for work disability, is not entitled to work disability compensation because of being returned to work at a comparable wage by the employer who employed the worker at the time of the injury giving rise to the claim being settled**. The employer shall be entitled to an 8% discount except as provided in subsection (a) of K.S.A. 44-510b and amendments thereto on the amount of any such lump-sum payment that is not yet due at the time of the award. Upon paying such lump sum the employer shall be released and discharged of and from all liability under the workers compensation act for that portion of the employer's liability redeemed under this section.

Before a lump sum settlement is entered, K.S.A. 44-531 requires a judge to first determine whether the lump sum payment is in the best interest of the worker **or** that the settlement will avoid undue expense, litigation or hardship to any party. And in those claims in which a worker returns to work for his or her pre-injury employer and otherwise would be entitled to receive a work disability, the judge must also determine whether the worker has been back to work for more than nine months. But the transcript from the settlement hearing does not reflect that the parties addressed those matters. All that can be gleaned from the transcript is that after asking claimant some leading questions, the SALJ stated that "I find this settlement to be in your best interest". The SALJ did not ask the claimant if he had returned to work, whether he was earning 90 percent or more of his preinjury wages, if he believed that he needed restrictions, if he knew that he might be entitled to further monetary and/or medical benefits or whether he was aware that he was entitled to $500 in unauthorized medical expenses.

Moreover, a finding that the lump sum settlement is fair, just and reasonable is not the equivalent to finding that a settlement is in a worker's best interest. In *Johnson*,[13] the Kansas Supreme Court mentioned several factors that were important when considering whether a lump sum settlement or redemption was in a worker's better interest - (1) the nature of the injury and its effect upon earning capacity, (2) the duration of the incapacity, and (3) the likelihood of a cure or improvement. More importantly, the Kansas Supreme Court stated it was hesitant to attempt to list all the possible factors that would support a lump sum redemption as no inflexible rule could be laid down. Nevertheless, the Court concluded the legislature intended there exist some unusual or exceptional circumstance to justify departing from the normal method of payment of compensation and terminating all rights and liabilities afforded by the Workers Compensation Act. The *Johnson* decision reads, in part:

> No inflexible rule can be laid down. However, we think the legislature had in mind that some unusual or exceptional circumstances should exist to justify departure

[13] *Johnson v. General Motors Corporation*, 199 Kan. 720, 433 P.2d 585 (1967).

> from the normal method of payment of compensation and termination of all rights and liabilities under a continuing award.[14]

Administrative regulations further protect workers in settlement awards. K.A.R. 51-3-9 provides:

> The administrative law judge shall not issue a settlement award unless: (a) the claimant personally testifies; (b) medical testimony by a competent physician is introduced as evidence, either by the oral testimony of that physician, or through a documentary report of a recent physical examination of the claimant as to the extent of the claimant's disabilities; and (c) any other testimony as the administrative law judge may require for the proper determination of the extent of disability and the amount of compensation due, if any. If documentary evidence of a medical report covering physical examination of the claimant is introduced in evidence, the claimant shall be able to testify that the claimant has read that report or had the report read to him or her, and that the claimant fully understands the medical evidence as to disability. If the injured worker submits to hospitalization, the records of the hospitalization and treatment, properly identified, may be received in evidence at a hearing on a claim. Medical and hospital expenses shall be made part of the record.

As K.A.R. 51-3-9 provides, a judge shall not enter a settlement award unless there is medical evidence addressing the worker's disability. And when there is a medical report presented, the worker must either read the report or have the report read to him or her. Moreover, the worker must fully understand the medical evidence regarding his or her disability. But the transcript from the August 5, 2010 settlement hearing does not establish whether claimant had read the medical report introduced at that hearing, or whether that report had been read to him or whether he fully understood the medical evidence concerning his injury. In fact, no mention of the report was made, other than to attach a portion of it to the Settlement Agreement.

Based upon this record, the Board finds that the matter should be and is hereby set aside and remanded to the Director for assignment of an ALJ for further proceedings. The evidence contained within this record does not support the SALJ's finding that the proposed settlement was, in fact, in claimant's best interest. Thus, the settlement must be set aside.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Settlement Agreement approved by Special Administrative Law Judge Jerry Shelor on August 5, 2010, is set aside and this matter is thereby remanded to the Director of the Division of Workers

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[14] *Id.* at 727.

Compensation for assignment to an Administrative Law Judge for further proceedings consistent with the findings herein.

IT IS SO ORDERED.

Dated this _____ day of November 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Geoffrey Clark, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Seth Valerius, Acting Workers Compensation Director